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Black Point Design Sdn Bhd v Ng Lee Peng & Ors

B HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-396–10 OF 2014
HASNAH HASHIM J
22 OCTOBER 2015

C *Evidence — Witness — Recalling of — Plaintiff produced forensic expert's report during trial — Defendants referred plaintiff's forensic report to another expert — Defendants applied to recall witness to ascertain integrity of plaintiff's forensic report — Whether defendants should be allowed to recall witness — Evidence Act 1950 s 138(4)*

D

At the main trial, the plaintiff had produced the plaintiff's forensic expert's report and the trial was adjourned for the defendants to engage their own forensic experts and for the experts to give their evidence in respect of the plaintiff's forensic report. Based on the plaintiff's forensic report, the E defendants' forensic expert had made several findings relating to activity on the first defendant's laptop after it had been taken away from her and before it was handed to the plaintiff's forensic expert. Subsequently, the defendants filed the present application via encl 38 for leave to recall the first defendant, ('DW1') and the plaintiff's witness, ('PW2') pursuant to s 138(4) of the Evidence Act F 1950. The defendants submitted that PW2 had to be recalled so that the circumstances in which the laptop was kept or used after it was taken from DW1 could be established. It was further submitted that it was important to determine the integrity of the plaintiff's forensic report and all the issues and G facts could only be established by recalling PW2 and DW1.

Held, allowing encl 38 in part:

(1) The defendants had full opportunity of adducing evidence at trial. There H was therefore no necessity to recall PW2 and DW1 for further cross-examination on the business relationship prior to the setting up of the plaintiff's company. Further, the evidence relating to the business relationship between the parties would have been available for use at the trial even before the proceedings commenced (see para 20).

I (2) With regards to the plaintiff's forensic report and the defendants' forensic report, both the reports were not available prior to the commencement of the full trial. Learned plaintiff's counsel had only produced the plaintiff's forensic report on the first day of trial. Therefore, it was necessary to recall PW2 and DW1 to give evidence with regards to the laptop, the subject

matter of both the forensic reports. The court was of the view that PW2 and DW1 be recalled to give evidence only in respect of the said forensic reports (see para 21).

[Bahasa Malaysia summary

Pada perbicaraan utama, plaintif telah mengemukakan laporan pakar forensik plaintif dan perbicaraan ditangguhkan bagi defendan-defendan mendapatkan pakar forensik mereka sendiri dan bagi pakar-pakar memberi keterangan mereka berkaitan laporan forensik plaintif. Berdasarkan laporan forensik plaintif, pakar forensik defendan-defendan telah membuat beberapa dapatan berkaitan aktiviti atas komputer riba defendan-defendan selepas ia diambil daripadanya dan sebelum ia diserahkan kepada pakar forensik plaintif. Kemudiannya, defendan-defendan memfailkan permohonan ini melalui lampiran 38 untuk izin memanggil balik defendan pertama, ('DW1') dan saksi plaintif, ('PW2') berikutan s 138(4) Akta Keterangan 1950. Defendan-defendan berhujah bahawa PW2 terpaksa dipanggil balik dengan itu keadaan dalam mana komputer riba tersebut disimpan atau digunakan selepas ia diambil daripada DW1 boleh dibuktikan. Ia selanjutnya dibuktikan bahawa ia adalah penting untuk menentukan integriti laporan forensik plaintif dan kesemua isu dan fakta hanya boleh dibuktikan dengan memanggil balik PW2 dan DW1.

Diputuskan, membenarkan sebahagian lampiran 38:

(1) Defendan-defendan mempunyai peluang secukupnya mengemukakan keterangan pada perbicaraan. Oleh itu tidak perlu untuk memanggil balik PW2 dan DW1 bagi pemeriksaan balas selanjutnya atas hubungan perniagaan sebelum penubuhan syarikat plaintif. Selanjutnya, keterangan berkaitan hubungan perniagaan di antara pihak-pihak akan terdapat untuk digunakan pada perbicaraan walaupun sebelum prosiding bermula (lihat perenggan 20).

(2) Berkaitan laporan forensik plaintif dan laporan forensik defendan-defendan, kedua-dua laporan tidak terdapat sebelum permulaan perbicaraan penuh. Peguam plaintif yang bijaksana hanya mengemukakan laporan forensik plaintif pada hari pertama perbicaraan. Oleh itu, ia adalah perlu untuk memanggil balik PW2 dan DW1 untuk memberi keterangan berkaitan komputer riba tersebut, perkara kedua-dua laporan forensik. Mahkamah berpandangan bahawa PW2 dan DW1 dipanggil balik untuk memberi keterangan hanya berkaitan laporan forensik tersebut (lihat perenggan 21).]

Notes

For cases on recalling of witness, see 7(3) *Mallal's Digest* (5th Ed, 2015) paras 3597–3606.

Cases referred to

Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70; [1970] 1 LNS 56, FC (folld)

Ong Yoke Eng & Anor v Lim Ah Yew [1982] 1 MLJ 226; [1981] 1 LNS 162 (folld)

Tan Kah Khiam v Liew Chin Chuan & Anor [2007] 2 MLJ 445; [2006] 4 CLJ 715, CA (folld)

Legislation referred to

Evidence Act 1950 s 138(4)
Rules of Court 2012 O 1A, O 92 r 4

Selva Kumar (Shankar with him) (Rose Hussin) for the appellant.
Rubini Murugesan (Ho Ai Ting with him) (Christopher & Lee Ong) for the respondents.

Hasnah Hashim J:

[1] Enclosure 38 is the defendants' application for leave to recall the first defendant ('DW1') and the plaintiff's witness, Dato' Adrian Teh Kok Hong ('PW2') to testify pursuant to s 138(4) of the Evidence Act 1950 and/or O 1A and/or O 92 r 4 of the Rules of Court 2012 and/or under the inherent power of the court.

THE GROUNDS FOR THE APPLICATION

[2] The grounds for the application are as follows:

(a) the plaintiff's forensic report was adduced at the very last minute. The court allowed the defendants to engage its own forensic expert to verify and ascertain facts stated in the plaintiff's forensic report. The defendants reserved their rights to cross-examine the plaintiff's expert witness on the plaintiff's forensic report after consultation and advice received from the defendants' forensic expert;

(b) the report adduced by the defendants' forensic expert pertaining to the review of the plaintiff's forensic report indicates that there may be an existence of manipulation of the laptop which may have a serious impact or consequence on the findings of the plaintiff's forensic expert;

(c) the integrity of the plaintiff's forensic report needs to be determined by asking PW2 further questions because there exist time frames that are unaccounted for which is the time between the laptop was taken away from DW1 and to the time the laptop was given to the plaintiff's forensic expert;

(d) the application is bona fide, warranted not frivolous to delay proceedings;

(e) the justice of the case demands that both DW1 and PW2 to be recalled to give evidence; and

(f) based on the facts and circumstances of the case the balance of convenience lies in favor of the defendants.

THE CAUSE PAPERS

[3] The relevant cause papers are as follows:

(a) the notice of application filed ('application');

(b) the defendants' affidavit in support affirmed by Ng Lee Peng on 2 June 2015 ('the defendant's affidavit');

(c) the plaintiff's affidavit in reply affirmed by Teh Kok Hong on 9 June 2015 ('the plaintiff's affidavit');

(d) the defendants' affidavit in reply affirmed by Ng Lee Peng on 12 June 2015 ('the defendant's affidavit (2)');

(e) the re-amended statement of claim re-dated 6 April 2015; and

(f) the defendants' amended defence and first defendant's counterclaim re-dated 8 January 2015.

BACKGROUND

[4] The trial commenced on 13 April 2015 and continued on 14 April 2015. The plaintiff called three witnesses and the defendants called five witnesses to give evidence.

[5] Before the trial commenced on 13 April 2015, the plaintiff had by way of the affidavit affirmed by one Andrew Lai Tsun Khiong on 1 April 2015 for and on behalf of Deloitte Corporate Solutions Sdn Bhd, sought to adduce a computer forensic investigation report dated 20 March 2015 as evidence ('the plaintiff's forensic report'). The plaintiff's forensic report is with regards to the laptop that was assigned to the first defendant when she was employed with the plaintiff. PW1, Andrew Lai Tsun Khiong was called to give evidence on 13 April 2015.

[6] Since the plaintiff had produced the plaintiff's forensic expert's report on the day the trial commenced upon the application of learned counsel for the

defendants, this court had allowed the defendants' time to enable the defendants to engage its own forensic expert to verify and ascertain the facts stated in the said forensic report.

[7] The counsel for the defendants had reserved her right to cross-examine the plaintiff's forensic expert on the plaintiff's forensic report as she would need to refer the aforesaid report to the defendants' forensic expert. The trial was then adjourned to 5 June 2015 for the respective experts to give their evidences in respect of the plaintiff's forensic report.

[8] The defendants then engaged one, Mr Sanjay Sidhu of BDO Governance Advisory Sdn Bhd ('the defendants' forensic expert') to conduct an independent verification and review of the plaintiff's forensic report. The defendants' forensic expert has, after evaluation of the plaintiff's forensic report, made several findings relating to activity on the first defendant's laptop after it had been taken away from her and before it was handed to the plaintiff's forensic expert.

[9] On 2 June 2015, the defendants filed this application for leave to recall the first defendant and Dato' Adrian ('PW2') to give evidence in relation to the plaintiff's forensic report.

THE PLAINTIFF'S CLAIM

[10] Briefly, the plaintiff's claims against the defendants are as follows:

(a) the first defendant:

(i) the amount of RM498,308.21 as special damages for the loan unpaid;

(ii) the amount of RM128,708.10 which was admitted as owing to the plaintiff;

(iii) the amount of RM174,000 as special damages for salary in lieu of notice;

(iv) general damages for the breach of agreement not to engage in a similar business;

(v) general damages for the breach of fiduciary duty towards the plaintiff;

(vi) exemplary damages for the breach of fiduciary duty towards the plaintiff;

(vii) an account of all monies received from the second defendant and the clients of the second defendant;

(viii) an order that the first defendant pays to the plaintiff all monies that have been accounted above as special damages; and

(ix) an order for injunction that the first defendant whether individually or through any representatives or employees or agents be restrained from soliciting, obtaining and or in any way transferring the business of the plaintiff and/or dealing with any of the clients or former clients of the plaintiff to the second defendant;

(b) the second defendant:

(i) general damages for inducing the breach of the contractual obligations for the third, fourth, fifth and sixth defendant to the plaintiff;

(ii) exemplary damages for inducing the breach of the contractual obligations of the third, fourth, fifth and sixth defendant to the plaintiff;

(iii) an account of all monies that the second defendant had received since it was incorporated; and

(iv) an order that the second defendant pays to the plaintiff all monies accounted for above as special damages;

(c) the third, fourth, fifth and sixth defendants:

(i) an order for injunction that the third, fourth, fifth and sixth defendant whether individually or through any representatives or employees or agents be restrained from soliciting, obtaining and or in any way transferring the business and/or dealing with any of the clients or former clients of the plaintiff to the second defendant for a period of two years after the termination of each of their contracts with the plaintiff; and

(ii) general damages for their respective breach of contract with the plaintiff;

(d) costs of this action.

DECISION

[11] Section 138(4) of the Evidence Act 1950 ('the EA') reads as follows:

> The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

[12] Suffian FJ (later Lord President) in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70; [1970] 1 LNS 56 sets out the three conditions

which must be satisfied before leave is granted to recall a witness to adduce further evidence,

> First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;
>
> Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[13] In *Ong Yoke Eng & Anor v Lim Ah Yew* [1982] 1 MLJ 226; [1981] 1 LNS 162, it was held that:

> In civil proceedings, it is in the discretion of the court of first instance to recall a witness or call further witnesses after his case is closed. Although under ordinary circumstances it may not be necessary or permissible ... unforeseen situations may develop and there may be also inadvertent omissions.

[14] The paramount consideration in such an application would be the interest of justice of the parties to the suit. His Lordship Gopal Sri Ram JCA (as he then was) in *Tan Kah Khiam v Liew Chin Chuan & Anor* [2007] 2 MLJ 445 at p 451; [2006] 4 CLJ 715 at p 725 (cited by both learned counsels) explained the broad principle as to how the court is to exercise its discretion in such a situation:

> ... For temporarily speaking, whether the trial judge may exercise his discretion to permit the reopening of a party's case will very much depend on the stage at which the application is made. It may be more likely that discretion may be exercised at the stage where the application is made immediately after a party closes his case. But it may be less likely that discretion will be favourably exercised where the application is made after the defendants have closed their case and just before the trial judge is about to pronounce his judgment.

[15] Learned counsel for the defendants in his written submission submitted that PW2 has to be recalled so that the circumstances in which the laptop was kept or used after it was taken from DW1 could be established. It is also the submission of learned counsel for the defendants that it is important to determine the integrity of the plaintiff's forensic report. The defendants need to establish who had access to the said laptop, how many times it was logged on and off as well as the reasons and purpose the laptop was accessed. All the issues and facts can only be established by recalling PW2 and DW1.

[16] This court then directed both counsels to list out the issues which they wish to further cross-examine, PW2 and DW1.

ISSUES FOR FURTHER CROSS-EXAMINATION AND/OR EXAMINATION-IN-CHIEF

[17] PW2:

(a) the circumstances in which the laptop was kept after it was taken away from DW1. The laptop was confiscated from DW1 on 2 July 2014 but was only given to the plaintiff's forensic expert for analysis on 15 December 2014. Questions need to be directed to PW2 to ascertain how and where the laptop was kept after it was confiscated from DW1;

(b) how many persons within the plaintiff had access to DW1's laptop and who were they? What was their capacity and authority to access DW1's laptop?

(c) as PW2 admits to having accessed DW1's laptop to remove the password, how and who were involved in this attempt to remove the password on the laptop? This attempt was successful?

(d) how many times was the laptop logged on and logged off? This is because the defendants' forensic expect suggests in this report that there were more than one activity on the laptop. Can PW2 account for these other activities — who were these persons who were periodically logging on and logging off DW1's laptop and what was their purpose in doing so?

(e) what was the reason the laptop was hooked onto a Western Digital My Book (an external source) before it was given for forensic analysis;

(f) questions to establish the working relationship between PW2 and DW1 at Pico International Sdn Bhd ('Pico International');

(g) questions as to how Concetto Design Sdn Bhd was established, incorporated and/or set up;

(h) the breakdown in the relationship between PW2 and DW1 resulting in the loss of goodwill, mutual trust and confidence between them; and

(i) issues arising from the averments stated in the proposed re-amended defendants' defence in the event leave is granted by this court to amend the first, second, third, fourth, fifth and sixth amended defence and first defendant's counterclaim re-dated 8 January 2015.

[18] DW1:

(a) question to establish the circumstances in which her laptop was taken away from her;

(b) with regard to the specific documents that have been found in the laptop, what was DW1's role in respect of this documents?

(c) to establish when DW1' got to know PW2 and their working relationship at Pico International;

(d) questions as to how Concetto Design Sdn Bhd was established, incorporated and/or set up;

(e) the initial quasi-partnership business relationship between PW2 and DW1;

(f) The breaches committed by PW2 resulting in the complete breakdown of the goodwill, mutual trust and confidence between them and DW1 bringing the partnership to an end; and

(g) issues arising from the averments stated in the proposed re-amended defendants' defence in the event leave is granted by this honourable court to amend the first, second, third, fourth, fifth and sixth amended defence and first defendant's counterclaim re-dated 8 January 2015.

[19] Prior to the hearing of this application, this court had allowed the application by the defendants to re-amend the amended defence (encl 45). The purpose of the amendment is to clarify the business relationship between PW2 and DW1.

[20] It is pertinent to note here that the defendants had full opportunity of adducing evidence at trial. Questions were put to DW1 through her witness statement of her business relationship with PW2 when they were both with Pico International (re: Q/A9 witness statement of DW1). There is therefore no necessity to recall PW2 and DW1 for further cross-examination on the business relationship prior to the setting up of the plaintiff's company. Furthermore, the evidence relating to the business relationship between the parties would have been available for use at the trial even before the proceedings commenced.

[21] However, with regards to the plaintiff's forensic report and the defendants' forensic report, both the reports were not available prior to the commencement of the full trial. The learned plaintiff's counsel had only produced the plaintiff's forensic report on the first day of trial. Therefore, it is necessary to recall PW2 and DW1 to give evidence with regards to the laptop, the subject matter of both the forensic reports. In the circumstances this court is of the considered view that PW2 and DW1 be recalled to give evidence only in respect of the said forensic reports.

[22] I had carefully considered the various affidavits filed herein and the submissions of learned counsels for the plaintiff as well as the defendants and the authorities tendered in support of their respective submissions. Guided by the principles enunciated by the cases mentioned above and in the interest of

justice, encl 38 is allowed however, the cross-examination of both PW2 and DW1 would be confined to the forensic reports in order to verify and ascertain facts stated in the said reports.

Enclosure 38 allowed in part.

Reported by Dzulqarnain Ab Fatar